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In The

SUPREME COURT of the UNITED STATES

October Term, 1965

No. 325

ROBERT L. BUTLER,

Petitioner,

v.

JOHN C. BURKE, Warden,
Wisconsin State Prison,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

WILLIAM A. PLATZ
Assistant Attorney General

Attorneys for Respondent

Post Office Address:

Room 114 East
State Capitol
Madison, Wisconsin 53702

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I. OPINION OF THE COURT BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 360 F. 2d 118, and is also set forth in petitioner's brief, pages 1a through 20a.

II. JURISDICTION.

Respondent opposes granting of a writ of certiorari on the grounds, 1) that no substantial question of violation of petitioner's rights under the 14th Amendment is pre-

sented by the trial court not personally informing the petitioner of the consequences of his plea, of which he had been informed by the district attorney, and, 2) that no substantial question of denial of due process of law in violation of the 14th Amendment is presented by petitioner's lack of knowledge that for his specific offense he might under some circumstances be committed for treatment rather than sentenced for punishment.

III. NATURE OF THE CASE.

Petitioner seeks review of a judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the United States District Court for the Eastern District of Wisconsin denying petitioner's petition for a writ of habeas corpus.

Petitioner was convicted on August 13, 1962, in the county court of Walworth County, Wisconsin, upon his plea of guilty, of enticing a child for immoral purposes. Petitioner was committed to the custody of the State Department of Public Welfare under the provisions of sec. 959.15 (2), Wis. Stats., for presentence examination. Petitioner was returned to court on October 15, 1962. The court found that, based on the presentence investigation report, petitioner was sexually deviated and in need of treatment for his abnormalities. Petitioner was then committed to the custody of the State Department of Public Welfare for treatment under the provisions of sec. 959.15 (6), Wis. Stats., the Sex Crimes Law.

Petitioner's petition for a writ of habeas corpus was denied by the Wisconsin Supreme Court after an evidentiary hearing.

IV. STATEMENT OF FACTS.

The summary of facts of petitioner's offense, conviction, and commitment are set forth in the report of the case below; 360 F. 2d 118, 119-120, and in the appendix to petitioner's brief, pp. 3a through 6a.

V. ARGUMENT.

A. Due Process Does Not Require That The Trial Court Personally Inform The Defendant Of The Consequences Of His Plea.

It is undisputed that the petitioner had been informed, prior to his arraignment, that the maximum penalty for the offense with which he was charged was ten years. Petitioner therefore knew that he was not confronted with a minor offense, but that his plea of guilty would subject him to the possibility of imprisonment for ten years. In the opinion below, the Court of Appeals states:

> "Our reading of the transcript leaves us without doubt that at the time of his arraignment petitioner freely and voluntarily entered his plea and intelligently waived his right to counsel. * * * He knew that the day before his arraignment he had made a statement to the Deputy Sheriff in which he voluntarily admitted his guilt; in his presence the victim of his assault had identified him; the statutory offense with which he was

> charged had twice been read to him, and he had been told just previous to his arraignment that the offense was serious and carried a maximum penalty of ten years' imprisonment. He was informed by the Court of his right to an attorney and that one would be appointed if he was without funds. He told the Court that he preferred to proceed without an attorney. In fact, he was not indigent, and no reason is shown why he could not have employed an attorney had he so desired." 360 F. 2d 122, Appendix 10a to 11a.[1]

It would be absurd to hold that fundamental fairness (the essence of "due process") requires that the trial judge give a defendant information which he already has or the conviction will be subject to collateral attack. It is certainly advisable that the judge do so but it is not a constitutional imperative.

The purpose of acquainting the prisoner with the range of punishments is to impress him generally with a concept of the seriousness of the offense. It goes on the assumption that a man might be willing to plead guilty or nolo contendere to a minor offense but would prefer to contest a prosecution for a more serious offense. Thus it is important to him to know whether he is pleading to an offense carrying a maximum penalty of 30 days in the county jail or 3 years in the state prison, which is the difference between the penalty for public drunkenness under sec. 947.03 (1), Wis. Stats., and for the same offense if the defendant is a repeater under sec. 939.62 (1) (a), Wis. Stats.

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[1]No question has been raised regarding petitioner's waiver of counsel.

It seems improbable that a person knowing an offense carries a maximum of 10 years in the state prison would plead guilty unless he was guilty, although he might feel differently about a charge of running a red light if he felt it would be more expensive and more trouble to defend the case than to plead guilty and pay a fine.

In the present case, a man of high intelligence, well educated, knowing the terms of the statute under which he was charged, knowing that he could go to prison for 10 years, understanding the charge against him and aware of the quantum of proof available to the prosecution, pleaded guilty. This was a trustworthy plea knowingly and understandingly made. Whether or not he understood the consequences of the plea in terms of the possibility of commitment under the Sex Crimes Law is totally irrelevant to the constitutional problem of whether the plea was a truthful one, knowingly and understandingly made.

B. Petitioner's Lack Of Knowledge That For His Specific Offense He Might Be Committed For Treatment Rather Than Sentenced For Punishment Presents No Substantial Federal Question Of Denial Of Due Process Of Law As Guaranteed By The 14th Amendment.

The Court of Appeals held:

"It is our judgment and we so hold that no Federal constitutional right of petitioner was violated by the failure of the State Court to acquaint petitioner with the provisions of the State Sexual Deviates Act prior to the time he entered his plea of guilty." 360 F. 2d at 124, Appendix p. 15a.

Petitioner was aware that the offense for which he was charged carried a maximum sentence of ten years. While petitioner is not now serving a sentence, but is in custody for treatment, such commitment of custody was under the provisions of sec. 959.15, Wis. Stats., and subsec. (13) of this statute provides that the maximum period of custody for a person committed under that statute shall be the same as the maximum sentence for the offense for which he was convicted, minus good time. Therefore, petitioner's commitment under the Sex Crimes Law is for a term which is by law the same as the penalty for the offense for which he was convicted, a penalty of which petitioner was fully aware when he entered his plea. Further, as the petitioner's commitment under the Sex Crimes Law is custody for treatment to cure him of the dangerous propensities which brought about the crime for which he was convicted, and not a sentence for his offense, it is not, strictly speaking, within the range of possible punishment for his offense.

The commitment of the petitioner under sec. 959.15, Wis. Stats., may, upon a showing that release would be dangerous to the public, and under all the protections of due process requirements, be extended for further treatment.

Sec. 959.15 (13) and (14), Wis. Stats.;

State ex rel. Volden v. Haas (1953), 264 Wis. 127, 130, 58 N. W. 2d 577.

There certainly is no more reason to inform a defendant of the provisions of sec. 959.15, Wis. Stats., regarding this possible extension of his commitment than there would be

to advise a person sentenced under the criminal law that if he should become mentally ill while in prison he might be transferred to Central State Hospital and his stay there might exceed his sentence, subject to a hearing on his sanity in the county court prior to expiration of his sentence. Sec. 51.21 (3), Wis. Stats.

Similarly, there is no reason for the trial court to inform a defendant of the nuances of statutory good time and institutional good time, and the conditions and consequences of forfeiture (secs. 53.11 and 53.12, Wis. Stats.), the probable date of his mandatory release from confinement based on his individual sentence, or the probable date of parole eligibility, the possible conditions of parole, and the consequences of violation. These potential consequences or benefits that may result from a defendant's confinement are in no way consequences of his original plea.

Petitioner relies on the dissenting opinion of Circuit Judge Kiley, which is based on Mr. Justice Black's opinion in *Von Moltke v. Gillies* (1948), 332 U. S. 708. The material quoted from *Von Moltke v. Gillies* (1948), 332 U. S. at 723-724 (Br. p. 11) is not from a majority opinion. There was none in that case. The real reason for reversal was because the charge was conspiracy, a very complicated field of law, and there was an unresolved issue (in the opinion of Justices Frankfurter and Jackson) whether an F. B. I. agent had given the defendant misleading legal advice (332 U. S. at 727-731). The case did not involve a state prosecution.

Petitioner also relies on *Jones v. Montana* (D. Mont. 1964), 235 F. Supp. 673. In that case the defendant was

charged with burglary in the first degree (*in the nighttime*) to which he pled guilty, and second-degree burglary (in the day-time) was a lesser offense. The charge apparently did not specify the nighttime, and moreover at arraignment the reading of the information was waived. The defendant later asserted that he did not know he was pleading to a charge of burglary in the nighttime, and that the burglary which he committed actually occurred in the day-time as defined by law. There was no claim he did not know that the charge he pleaded to carried a maximum term of 15 years. This case is completely distinguishable from the instant case. In *Jones* the defendant did not know the elements of the crime to which he was pleading guilty. In the instant case, Butler knew and understood both the terms of the statute and the language of the charge.

C. THERE IS PRESENTED NO CONFLICT OF DECISIONS REGARDING THE ISSUE CONCERNING UNDERSTANDING THE CONSEQUENCES OF A PLEA THAT WOULD PERSUADE THIS COURT TO GRANT CERTIORARI.

In *Munich v. United States* (9th Cir., 1964), 337 F. 2d 356, the court based its decision to reverse the conviction of a narcotics case defendant who was not informed of the consequences of his repeater status, on Rule 11 F. R. Cr. P. Wisconsin does not have such a rule and it is sufficient here if the defendant has received the information from other sources. No case has been found which applies the *Munich* rule to a state conviction.

The United States Court of Appeals for the District of Columbia, in *Smith v. United States* (1963), 324 F. 2d 436,

441, cert. denied, 376 U. S. 957, 84 S. Ct. 978, 11 L. Ed. 2d 975, stated that even under the judicially expanded interpretation of Rule 11 F. R. Cr. P., the possibility of parole is not a consequence of a plea.

Any conflict that may be presented by these decisions is in their interpretation of Rule 11 F. R. Cr. P. This is a rule of Federal criminal procedure, not applied to proceedings in state courts under state law and procedure, and any conflict in its interpretation is not properly presented to this Court in this case.

VI. CONCLUSION.

It is therefore respectfully submitted that there is not a substantial Federal question presented on the record in this case and that there is no occasion for this Court to grant certiorari.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General of Wisconsin

WILLIAM A. PLATZ
Assistant Attorney General

Attorneys for Respondent